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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 581

JAMES W. MILLER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully petitions this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the Second Circuit rendered in this cause on July 10, 1957 affirming a judgment of the United States District Court for the Southern District of New York entered on November 30, 1956, and the order and opinion dated October 1, 1957 denying the petition for re-hearing duly filed on July 24, 1957.

Opinions Below

The opinion of the Court of Appeals affirming the judgment of convictions is as yet unreported but its text appears in the appendix, post, pp. App. 6-App. 14.

The opinion of the Court of Appeals denying the petition for re-hearing is likewise unreported to date but its text appears in the appendix, post, pp. App. 1-App. 5.

Grounds on Which Jurisdiction Is Based

The date of the judgment sought to be reviewed and the time of its entry is July 10, 1957. The date of the order and its entry denying the petition for a re-hearing and granting a stay for 30 days pending an application for Certiorari is October 1, 1957. The statutory provision believed to sustain the jurisdiction of this court is United States Code, Title 18, Section 1254.

Questions Presented for Review

1. Under the rule of the recently decided *Jencks* case (*Jencks* v. *United States*, 353 U. S. 657), was it reversible error for the courts below to (1) deny the defendant the right to examine a prior inconsistent statement of the government's principal witness Mishel and (2) to foreclose defense counsel from making any use of another (and concededly contradictory) statement of the same witness which was not made available to the defendant until after the witness left the stand and (3) to also refuse to make available to defense counsel one of two prior reports made by another government witness (a Secret Service Agent) on the subject matter of his testimony?

2. Does the statute (18 U. S. C. § 1001) upon which the indictment was based make it a crime for a person, in this case a bank president, to write a letter to a government agency which merely recites his (the writer's) interpretation of conclusions reached by government investigators who had interrogated the writer with respect to the procedures followed by the bank in cashing certain government bonds, or does the statute only make criminal

a wilfully false and fraudulent statement of a material fact, as distinguished from mere opinion?

3. Was it reversible error for the trial court to permit (and the Court of Appeals to approve) an extensive and highly prejudicial cross-examination of the defendant as to various (but unproved) collateral matters implying moral turpitude, the mere inquiries as to which, despite defendant's denials, suggested to the jury that the defendant was a man of bad moral character and unworthy of belief, or should the cross-examination have been restricted, in accordance with the prevailing rule in all the Federal circuits, to those collateral matters which involve a conviction for felony, or for such misdemeanors as embraced moral turpitude?

The Public Interest in the Questions Involved

There exists in this case a public interest in the three questions involved which far transcends the immediate parties.

1. With respect to the first question, which is that posed by the decision in the *Jencks* case, the courts below refused to accord to an ex-bank president the trial privileges which this court in *Jencks* v. *United States* accorded to an ex-Communist labor leader, e. g., the right to inspect prior contradictory statements of government witnesses against him and to cross-examine such witnesses with respect thereto. Our historic principle of equal justice under law was, therefore, flagrantly violated by the decision below. Whether one accused of crime be a bank president, a labor leader, or the most nefarious member of society, a due respect for "principle" would mandate that each be treated alike before the law. Every citizen of the United States, and not merely the petitioner, has a vital interest in the maintenance of the equality prin-

ciple. Only by allowing certiorari can this court correct the decision below and assure the general public that all, regardless of station in life, shall be treated equally before the law.

2. With respect to the second question, i. e., as to whether a mere statement of opinion or belief as to conclusions reached by a government agent constitutes the crime of making a wilfully false and fraudulent statement for which one may be imprisoned for five years, the general public, too, have a vital interest. In this modern age with the hordes of government agents who are constantly interviewing people in all walks of life, the general public are very vitally concerned with knowing whether, after such an interview, they act at their peril in expressing, either orally or in writing, their own mere interpretation or opinion of the interview. Few members of the public, or even of the bar, would consider that the mere expression of such an opinion, would subject one to conviction for crime and five years' imprisonment. If the right of free speech and thought, or of letter-writing, at least on the subject of interviews with government agents, is fraught with such dangers, then the general public is certainly interested in knowing it. By allowing certiorari in this case, this court can serve, by its decision, to either allay public fears, or to warn of the grave dangers implicit in expressing an opinion of interviews with government agents.

3. The third question, too, has a great public interest because, with singular unanimity, the decisions of all the Circuits (even the Second, with the exception of the instant case) have been to the effect that, in a criminal case, a defendant may only be cross-examined as to those collateral matters as to which he has been convicted for felony or misdemeanors involving moral turpitude. The instant case is the only exception. The general public is, of course, interested in whether there is to be a uni-

form federal rule on so vital a subject, or whether the Second Circuit alone is to have its own peculiar rule. Indeed, its decision in the instant case is in conflict with its own decision in an earlier case (*Provo* v. *United States*, 215 F. 2nd, 531; 2nd Cir. 1954.)

Summarized, therefore, certiorari should be granted herein because the public at large, as well as the petitioner, is equally concerned with the following matters, viz.,

1. Whether under Federal law those accused of crime shall be treated equally before the law and all given the same trial privilege of compelling the production of prior contradictory statements of government witnesses for use on the cross-examination of such witnesses;
2. Whether it is such a heinous offense for a citizen to write a letter to a government agency expressing an opinion of an interview with a government agent, that conviction of Federal crime may result therefrom;
3. Whether in all the eleven Federal Circuits but one, a person accused of crime is protected against cross-examination as to any collateral matter except conviction for felony or for misdemeanor involving moral turpitude.

The Statute Involved

18 U. S. C. Section 1001:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Statement of the Case

The defendant, James W. Miller, was President of a New York City bank known as the Pennsylvania Exchange Bank from 1947 to 1954, having served as Vice-President between 1930 and 1947 (588a, 590a). From 1920 until 1930 he had been connected with a number of other New York City banks in various capacities (586a, 587a, 588a).

The defendant has been convicted under a three count indictment for making alleged false and fraudulent statements to the Fiscal Service of the United States Treasury Department (43a). Each count of the indictment is based upon a separate letter sent to the Fiscal Service, two of which dated December 26, 1951 and April 4, 1952, respectively, were written by the defendant himself, and the third by an attorney representing the bank (46a; Exhibit 24, 40a). Each of the letters in question related to the cashing of certain United States Savings Bonds at the bank (43a).

The three letters which formed the basis of the indictment were written in response to Treasury Department requests for reimbursement by the bank for the amount of the bonds ($6,684.00) and the purpose of the letters was to explain that the bank's position in resisting payment was the belief of its officers that Treasury regulations had been complied with in cashing the bonds (43a; Exhibit 22, 25a; Exhibit 23, 29a, and Exhibit 24, 40a). In the first letter (Exhibit 22; 25a) the defendant asked, in the final paragraph thereof, that the bank be granted relief from liability for the loss—because at the time the transaction was investigated "we [referring to the defend-

ant and other bank officials] were informed that the bonds were properly cashed" (46a)—. In the second letter (Exhibit 23; 29a) the defendant expressed his "regret" that the Treasury still insisted upon reimbursement because, as he put it, "*we feel* that these bonds were cashed in good faith" (46a), but despite his expressed regret and his "feeling" that the bonds had been properly cashed, he did, in the letter's final paragraph (30a), advise the Treasury that the bank's Bonding Company had been notified of the loss and that the Treasury would be reimbursed as soon as the claim had been processed. Obviously, there was no attempt to defraud the Treasury by either of the first two letters. In the first place, in both letters the Treasury was merely advised of the defendant's interpretation of what its investigators had told him after his interview. Clearly, the Treasury had its own investigators' reports and knew what their findings were so that it was not misled or deceived by the defendant's interpretations or opinions. And, at all events, the investigators had no authority to relieve the bank from liability, and the issue of its liability would not be resolved on the basis of what the investigator had "informed" the defendant or by what the defendant's "feelings" were as to compliance with regulations. Finally, however, any attempt to defraud by the opinions expressed in the letters is completely negatived by the assurance given in the last paragraph of the second letter (30a) to the effect that the Treasury would be reimbursed as soon as the claim for the loss was processed through the bank's bonding company; and, in fact, it (the Treasury) was actually paid in full (645a). The third letter which formed the basis of the third count of the indictment was written by the bank's attorney (46a; Exhibit 24, 40a) and contained a recital of the attorney's analysis of the file relating to the transaction and the conclusion he had reached as a result thereof that the bank was not liable for the loss (40a, 41a). At the conclusion of this letter (41a) the attorney requested the Treasury "to have the

matter reconsidered" and he suggested that the matter be investigated further. In the event the Treasury elected to re-investigate, he assured it that (41a) "we would welcome same and cooperate with you to the fullest extent." That such a letter could form the basis of a criminal charge of making wilfully false and fraudulent representations, seems most incredible. Yet it forms the sole basis of the third count and the defendant was convicted under it (even though he did not write the letter, but merely reviewed it before it was mailed).

The bonds which were cashed by the bank were registered in the names of the members of the Nat Chernoff family from whom they had (unknown to the defendant) been stolen (43a). The exact circumstances of the cashing of these bonds were as follows: Some time in December 1949 (21a) one Irving Mishel, who had been a customer of the bank and known by the defendant since 1947 (593a, 595a), came into the bank with a man whom he described as his friend and the manager of a restaurant known as Roth's Restaurant (626a, 728a). Mishel introduced the man as Mr. Chernoff (749a, 761a). Mishel stated that Chernoff had some bonds that he wanted to cash (626a, 728a). The defendant examined the bonds and asked the man who claimed to be Chernoff whether he was the true owner thereof and he answered in the affirmative (626a, 728a, 729a). On the basis of this identification by Mishel, the defendant authorized the redemption, and a teller cashed the bonds (626a, 728a-731a). The Treasury regulations provide that a bank may cash bonds for a stranger if he is identified by a bank customer (See Exhibit 21, par. 4, 17a). It subsequently developed that the stranger in the instant transaction, who was introduced by Mishel as Chernoff was, in fact, a thief and an imposter whose true name was Rosenberg. The latter, as a result of grand jury testimony given by the defendant in this case, was indicted and pleaded guilty for his part in forging the bonds involved in the transaction (68a, 761a). It also

developed that Mishel, prior to the cashing of the bonds, had procured them from one Mickey Rosenberg and one Frank Pace with full knowledge that they had been stolen from the Chernoff family (119a, 120a).

At this point, it is necessary to go into Mishel's dealings with the bank and the defendant *prior* to the cashing of the bonds in December 1949, because, it is in the light of this prior background that the cashing of the bonds must be evaluated and not on the basis of subsequently acquired knowledge by the defendant.

The defendant first met Mishel at the bank in October, 1947 at which time he was introduced as a prospective customer by an attorney named Lurie (593a, 594a). Lurie, Mishel's sponsor, had himself been a customer of the bank for two years prior to the introduction and was still a customer at the time of the trial in October 1956 (593a, 611a). At this first meeting, the defendant was advised, by both Lurie and Mishel, that the latter (Mishel) was the owner of a package liquor store (594a). At that time the bank was doing a great volume of business with package liquor stores and was anxious to expand that type of business (594a). According to the defendant, the bank's experience with liquor store financing had been very good over the years, a result which he attributed to the fact that it was "a licensed business, controlled by the state" (594a).

The important fact, to be emphasized at this point, however, is that the defendant was told at the very first meeting that Mishel was a liquor store proprietor (594a). With the defendant's knowledge of the strict provisions of the New York State Liquor Law (See New York Alcoholic Beverage Control Law, Section 126, subdivs. 2 and 4; Chapter 428 of the Laws of New York 1934, as last amended by Chapters 369 and 536 of the Laws of 1953) he had a right to assume that Mishel was of good character

and had not been convicted of crime because otherwise he would not have been given a license to operate. Long after the Chernoff bond cashing transaction it was learned that Mishel had, in fact, been convicted of assault in Bronx County, N. Y., in 1945 (19a) for which he received a suspended sentence (19a). But, Miller had no way of knowing this and had every reason to believe, because Mishel was the holder of a state liquor license, that he had an unblemished record. Mishel was not convicted of any other offense until long after the 1949 Chernoff bond transaction. In fact, his subsequent convictions were not until 1952, 1953 and 1955 (19a, 20a, 660a). Thus, as of 1947 when the defendant first met Mishel he had no reason to know, especially since Mishel was a liquor store licensee, that he had any criminal background (indeed it was quite minor in 1947). Nor was Mishel convicted of any offense between the time of his introduction to the defendant in 1947 and the bond cashing in 1949.

Within a week after the introduction, Mishel opened an account in the bank of which defendant was president (594a). The first account was opened in the name of Berkshire Wine and Liquor Company (597a) and a subsequent business account was opened in the name of Mishel Wine and Liquor Company (599a). A number of other business and personal accounts were also opened from time to time (597a-599a). Over the subsequent years credit was extended by the bank to various Mishel enterprises as well as to himself and members of his family (598a-605a).

Thus, as of December 1949, when the Chernoff bond cashing transaction occurred, the defendant had no reason to believe that Mishel was anything other than an active and reputable businessman engaged in the retail liquor store business who had been a good customer of the bank for over two years. When, therefore, Mishel came into the bank and introduced as his friend a man

whom he identified as Chernoff (626a, 728a, 729a), and the man so introduced also claimed to be Chernoff, the defendant had no reason to believe that both were liars. The Treasury Regulations (Exhibit 21, par. 4, 17a) contemplate that in a practical workaday banking world occasions will arise when a stranger to the bank will seek to cash bonds there. Recognizing the frequency of such transactions the cited rule provides that the bank may cash the bonds provided that the person seeking to cash them is identified by a customer of the bank. That Miller was duped, or may have been careless or negligent is one thing. But that he committed a crime is quite another. As a matter of hindsight, it is now quite apparent that both Mishel and the imposter Rosenberg, who posed as Chernoff, were crooks and nefarious characters of the lowest order. Indeed, they were apparently so diabolically clever that they duped other large banking institutions in New York City, as well as their officers, in the same type of transaction (203a, 206a, 234a).

The first time that the defendant Miller had any reason to question Mishel's integrity was in March 1950, a short time after the Chernoff bond transaction (656a). The incident which brought home to the defendant Mishel's dishonesty arose out of an entirely different transaction and related to a $10,000 bank loan made to one of Mishel's liquor store enterprises (656a, 657a). As of the time this loan was made in March 1950, the defendant had no reason to believe that there was anything questionable about the earlier Chernoff bond cashing transaction because he was first advised of its dubious character by the Treasury Department's letter to him dated July 19, 1950 (Exhibit 20; 19a, 20a). To get back to the March 1950 loan to the liquor store, it appears that Mishel applied for a $10,000 loan to the Mishel Wine and Liquor Company and submitted a financial statement showing his ownership of it (656a, 657a). After the loan was granted, the bank's credit department ascertained that prior to getting the

proceeds of the loan, Mishel had actually sold the liquor store (657a, 658a). Miller immediately demanded an explanation from Mishel and, the explanation being unsatisfactory, Miller demanded that the $10,000 loan be paid immediately (658a). Mishel said he was unable to pay the loan immediately but that he could furnish stock exchange securities as collateral (658a). A day or so later Mishel brought in securities exceeding in value the amount of the loan, but the securities were in the names of Frank and Sadie Alpren (658a, 659a). Miller stated that the securities were unsatisfactory as collateral unless accompanied by an hypothecation agreement authorizing Mishel to pledge them. A duly executed hypothecation agreement, purportedly executed by the owners, was subsequently delivered to the bank (659a). Some two months later, or in May 1950, Mr. Reedy, a Vice-President of the bank, reported to Mr. Miller that he had received a tip that there was some irregularity about the Alpren stock which had been pledged as security for the Mishel loan (659a, 660a). Mr. Miller directed Mr. Reedy to immediately report the matter to the District Attorney (660a) which the latter promptly did (729a-794a). It later developed that the pledged securities had been stolen and the defendant testified before the Grand Jury against Mishel which resulted in Mishel's indictment and plea of guilty (660a). Actually, at the time of the trial in this case, Mishel was under a 10 to 20 year sentence which had been meted out to him in 1952 for the crime (660a).

Thus, the defendant, Miller, was responsible for the apprehension, indictment and imprisonment of the man who, on this trial, was the government's chief witness against him (656a-661a). Four or five months later, or on October 6, 1950, Mishel was arrested by a Secret Service Agent named Sershen for his part in the Chernoff bond transaction (660a, 661a).

As previously pointed out, the first time that Miller learned that there was anything questionable about the

Chernoff bond transaction was when he received the Treasury Department's letter of July 19, 1950 (Exhibit 20; 19a, 20a). More than six months having elapsed since the transaction, which was a relatively small one for a bank of this size, involving only $6684.00 worth of bonds, Mr. Miller, as head of such a large institution, could not be expected to have any distinct recollection of it. Accordingly, and immediately upon receipt of the Treasury Department's letter of July 19, 1950, Miller turned the letter over to the bank's head teller to collect all available information surrounding the transaction (616a). The letter had stated that a Treasury agent would visit the bank (Exhibit 20; 19a; 617a), and Secret Service Agent Sershen did so on August 9, 1950 (624a). This first visit was very brief, and the defendant told Sershen that Mr. Brennan, Manager of the bank, would make all bank records available and that everybody in the bank would cooperate (624a). Concededly, this cooperation was fully given (465a). Sershen's next visit was some time before the middle of October 1950 (623a). Mishel, it will be recalled, was arrested by Sershen in connection with the Chernoff transaction on October 6, 1950 (660a, 661a) and, according to Sershen's testimony, his second visit to the bank was made on the same day, but not until after Mishel's arrest (465a-467a).

We now come to the details of this crucial second visit of Agent Sershen on October 6, 1950 and it is crucial because what transpired between Sershen and the defendant on this occasion (624a-6[illegible]) is what gave rise to the writing of the three letters upon which the whole indictment is founded (43a-47a).

The defendant Miller's version of the interview (625a-627a) is not essentially different from that of Agent Sershen (467a-468a), except in one respect. According to Miller, Sershen told him at the time, that the bank was "in the clear" because it had complied with the regulations

in obtaining identification by a bank customer of the person who cashed the bonds (626a). Sershen, on the other hand, denied that he had expressed any such conclusion and, on the contrary, claims that he told Miller "that it didn't appear to me (Sershen) that he (Miller) had used proper care in accepting those bonds for redemption" (468a).

The fallibility of human memories may account for the discrepancy in the respective recollections of the interview. At all events, whether Sershen said the bank was "in the clear" or whether he said it was negligent in the procedures that had been followed, should not make the difference between guilt and innocence of Federal crime. The bank's liability would be determined, not by what Sershen did or did not say to Miller, but rather by the Treasury Department's ultimate conclusion as to whether or not its regulations had been complied with. In other words, liability or non-liability, would be decided irrespective of any conclusions expressed to Miller on the subject by Sershen. Conceivably, Miller's version of what Sershen stated to be his opinion of the bank's liability is a correct report of what Sershen said. Nevertheless, no one can seriously contend that that opinion, if it were expressed by its minor agent, would bind, or influence, the Treasury. Nor would it be defrauded, or misled by letters written to it more than a year later in which Miller and the bank's attorneys reported Miller's version of the interview. Yet the sole basis of the indictment is the writing of such letters! Sershen made at least two reports to the Treasury of his interview (120a) and presumably he reported to it his own version. How then could the government have possibly been misled or defrauded by the letters upon which the indictment is based? Conceding, *arguendo*, that the letters contained, whether mistakenly or not, an incorrect statement of Sershen's conclusion, as expressed by him at

the interview, does it constitute a Federal crime to make such a mistake? Especially is this question apropos, where it is clear, beyond any possible doubt, that no harm could, or did, result to any government agency as a result thereof. Writing letters giving a government agency the writer's interpretation of conclusions expressed by its agent at an interview is, indeed, a very hazardous occupation, if one must run the risk of punishment for serious Federal crime for any incorrect statements in the letter and regardless of whether the government is defrauded thereby.

Following the October 1950 interview between Sershen and Miller, nothing more was heard by Miller or the bank from the Treasury Department for over a year (627a). Then, on or about November 16, 1951, the Treasury Department wrote Miller a letter (Exhibit A. V., 23a, 24a) in which it was stated that the bank's investigation had disclosed that the stolen bonds had been forged by an imposter, that the proceeds had been received by Mishel who was under various charges, and that the probability of obtaining restitution from Mishel was "extremely remote" (23a). Accordingly, demand was made that the bank pay the value of the bonds ($6,684.50) to the Treasury (24a). The long delay which had intervened between the October 1950 interview and the November 16, 1951 letter, clearly indicates (as well as does the text of the letter) that the Treasury Department had been attempting, or hoped, to recover the value of the bonds from Mishel or the imposter who had forged them, before seeking to recover from the bank. Indeed, it was not until it became clear to the Treasury that such efforts would prove unavailing that demand was made upon the bank. It was against this background that the first allegedly incriminating letter (which forms the basis of the indictment's first count) was written on December 26, 1951 (Exhibit 22; 25a, 26a). The portion

of this letter which the government claims to be false and fraudulent reads as follows (46a, 25a):

> "At the time the investigation was made by your Department *we were informed* that the bonds were properly cashed in accordance with procedure laid down in your official circular and consequently no claim would be made against us." (Emphasis added.)

A subsequent letter written by the defendant dated April 4, 1952 (Exhibit 23; 29a, 30a) forms the basis of the second count of the indictment (43a-46a; Exhibit 23; 29a, 30a). The purportedly incriminating portion of this letter reads as follows (46a):

> "We regret that you are insisting on reimbursement because *we feel* that these bonds were cashed in good faith and within the meaning, letter and spirit of Paragraph 4 of the Treasury Department in a circular covering such redemptions dated December 19, 1947." (Emphasis added.)

Although, in the letter, Miller expressed his "regret" that demand was being made for reimbursement he, nevertheless, in the final paragraph of the letter, assured the Department that it would be fully reimbursed as soon as the claim was processed through the bank's bonding company (30a). Assurance of such reimbursement, certainly negatives any intent to willfully deceive or defraud the Treasury Department. Yet the defendant was convicted of the crime of making false and fraudulent representations for writing this letter! Actually, the Treasury was, in due course, fully reimbursed for the bonds by the bank's bonding company (645a).

The final letter regarding the Chernoff bond transaction and which formed the basis of the third count of the indictment, was dated June 4, 1952 (Exhibit 24; 40a, 41a)

and was written by the bank's attorney. This letter had been examined by the defendant before it was mailed (641a-643a), and it was apparently the government's theory, that proof of such pre-view of the letter by the defendant was sufficient proof of his authorship to warrant his indictment and conviction for its contents. Actually, the letter (40a, 41a) was a most innocuous document. It explained that the attorney who wrote it had reviewed the file as to the bond cashing transaction and had interviewed the tellers and the defendant and had concluded, as a result of such review and interviews, that the bank was not liable for the loss (40a, 41a). At most it gave the attorney's conclusion as to the bank's liability and the basis for it. But the attorney did not insist upon the acceptance of his opinion. He suggested a reconsideration and re-investigation. At the conclusion of the letter, he stated that should the Treasury decide to re-investigate "we would welcome same and cooperate with you to the fullest extent". How so innocent a letter could be construed to be such a false and fraudulent representation to a government agency as to constitute a grave crime, is difficult to comprehend. Yet the defendant has been convicted of a serious crime because of it, and notwithstanding that he merely pre-viewed it.

Over two years after the last of the three letters was sent, or on December 21, 1954, the defendant was indicted under a three-count indictment, each count being based on a separate letter (1a, 3a, 4a).

In the four years which intervened between Mishel's arrest on October 6, 1950 and the time of the defendant's indictment in December 1954 (465a, 466a), Mishel had been incarcerated in various penal institutions in New York State and convicted of many crimes, State and Federal, including, but not limited to those arising out of the Chernoff bond transaction (19a, 20a, 62a, 85a, 95a,

97a, 99a). The first conviction was in connection with the Alpren securities which he had pledged with the Pennsylvania Exchange Bank (172a, 173a, 660a). Miller, the defendant here, as President of the Bank was directly responsible for Mishel's 1952 conviction on this charge (660a). This first conviction was really the beginning of Mishel's downfall because, while incarcerated in jail in connection with it, he was repeatedly interrogated by hordes of government prosecutors, agents and investigators with respect to diverse other crimes (58a, 62a, 197a, 189a, 200a, 201a, 229a) which resulted in his subsequent convictions for other crimes (19a, 20a, 62a, 85a, 95a, 97a, 99a). Thus, Mishel undoubtedly felt, and not without some reason, that Miller, who was concededly responsible for the first conviction (involving the Alpren stock), was his arch-enemy and the real cause of his downfall. It was upon this conviction that he was, at the time of the trial, serving a 10 to 20 year sentence (19a). And while in jail on this charge, Mishel was doing his utmost to bargain with District Attorneys and others handling the other charges which he faced, in an attempt to get suspended or concurrent sentences or other considerations for himself (58a, 59a, 60a, 62a, 63a, 66a, 67a, 92a) and he, in fact, succeeded in inducing one Prosecutor to arrange for a single sentence to cover a multiplicity of crimes (60a, 61a, 68a). On another occasion he testified as a volunteer government witness against a fellow prison inmate with respect to alleged conversations between himself and the inmate (93a-95a) for which effort he undoubtedly expected some consideration from the government. Other attempts were made by Mishel to curry favors from Prosecutors. For example, when asked in a series of questions whether he had offered to testify for District Attorney Hogan in connection with the notorious Jelke prostitution case, about which he knew nothing, in consideration for a promise of early parole (243a-245a) he answered the whole series of questions with the familiar "I don't remember" (243a-245a). A similar answer was given to

a question as to whether he had urged Wissenfield, a fellow prison inmate, to give false testimony in another bond matter (242a, 243a). Nor could he recall whether he had volunteered to give Secret Service Agent Motte some testimony relating to the theft from a bank of unissued government bonds (245a).

We have documented in detail the characteristics of Mishel and his propensities for inducing prosecutors, and others, to make bargains with him in exchange for testimony, only because, in the instant case, he turned out to be the government's chief and main witness against the defendant Miller. Of course he had additional special reasons to wreak vengeance upon Miller—because Miller was the main cause of his downfall which began with the 1952 conviction in the Alpren stock case (660a). And not only was there proof of two other felony convictions after that (19a, 20a), but Mishel also admitted that he had committed many crimes for which he had not been convicted (107a, 108a), some of which involved the cashing of stolen bonds (108a, 109a). Indeed, he pleaded guilty to a grand larceny indictment involving the cashing of about $6,000 worth of bonds at the Bankers Trust Company (234a) which is one of New York's leading banking institutions.

As the Government's chief witness, Mishel told a fantastic story against Miller in which he tried to implicate Miller, a bank president of unblemished record, as his partner in crime who, for 10%, or $668.45, of the face value ($6,684.50) of the Chernoff bonds arranged to have them illegally cashed at the bank of which he was President (29a-34a). Miller's salary as president of this large New York City bank does not appear in the record, but presumably it was substantial. If Mishel's fabricated story is to be believed, then Miller belongs in a mental and not a penal institution. That Miller would risk his reputation, position and standing in the community for such a monetary pittance, as a mere matter of economics—

and moral considerations aside, is an assertion which only one with the characteristics and motives of Mishel could make. Not a single witness corroborated Mishel's story of Miller's alleged collaboration with him in criminal activities. Even, Rosenberg, who was convicted with Mishel for the part he played in the Chernoff bond deal was not called by the government to substantiate any of the details related by Mishel. The defendant, of course, denied Mishel's story, in toto (608a-615a; 629a; 646a-655a). Much of Mishel's testimony (19a-247a) deals with matters wholly irrelevant to the indictment and also irrelevant to the basis of this petition for certiorari. We will limit ourselves to the matters relevant to this petition.

Mishel testified that at the time of the Chernoff bond cashing transaction, he came into the bank alone with the bonds and asked Miller to cash them (29a). Miller, according to Mishel, simply said (29a):

"I can cash them. Have somebody sign them."

Thereafter, according to Mishel, he had Rosenberg sign them (29a, 31a) and the signed bonds were brought back the next day by Mishel to Miller (31a). Miller refused to cash them on this second occasion, according to Mishel, only because they were not properly signed (31a). Thereupon, Mishel said he telephoned Rosenberg and had him come over to the bank and re-sign the redemption forms properly (32a).

Why Mishel and Miller, if they were the partners in crime that Mishel claimed them to be, should hesitate to sign the bonds themselves, does not appear. Surely such arch-villains would not hesitate at a little matter of forgery. On other occasions, notably the Alpren stock deal, Mishel was not so squeamish about forgery. But Mishel insisted that the signing was done by Rosenberg

(32a). In this he was right, but the signing by Rosenberg took place under entirely different circumstances than those described by Mishel. Miller, it will be recalled, testified that Mishel came into the bank with a man he described as his friend and whom he identified as Mr. Chernoff (626a, 728a, 729a). The man so introduced acknowledged himself to be Chernoff and declared himself to be the owner of the bonds (626a, 728a, 729a). Later, of course, it developed that he was, in fact, Rosenberg, and, upon Miller's testimony, he was subsequently indicted and convicted for forgery (68a, 761a).

At the trial, of course, the direct conflict between Mishel's version of the circumstances under which the bonds were cashed and the defendant's testimony as to the same transaction, presented a sharp issue of veracity. It became one of the crucial issues in the case. The credibility of the respective witnesses on the subject was, therefore, of paramount importance.

On his cross-examination Mishel admitted that he had made many prior statements to government agents (65a; 194a-201a; 207a, 208a; 230a, 231a). The witness had a distinct recollection of a 50 page statement which he described as a "master" statement (230a) and when asked whether the statement conformed to his trial testimony, he conceded that "It could vary a little" (231a). And when asked whether everything he testified about was in the statement, he answered (230a):

> "Practically. There could be some isn't, some is; I don't know."

The Assistant United States Attorney gave Mishel the "master" statement to read just before the trial (230a, 231a). The witness gave the "master" statement three years before the trial (207a) but he unqualifiedly stated (207a): "From time to time I made additional statements". The successive additional statements, according

to Mishel, consisted of additions to the "master" statement. As the witness put it: "No, they were added to it. There were some more facts to it" (208a). The text of the "master" statement itself was not changed (208a).

Thus, the proper foundation having been laid, defense counsel thereupon made the following application to the court (246a):

> "Mr. Rosenblum: I now respectfully ask your Honor that the statements that this witness has testified about be produced by the Government for your Honor so your Honor may examine them under the *Krulewich* case to see whether or not there is something in them, which would entitle me to use them for cross-examination."

The United States Attorney stated that he had the "Master" statement in his office, but that he did not know where any other statements were (246a).

The Court directed the prosecution to produce any statements in its possession (246a) but, despite the many statements which Mishel said he made (65a, 194a-201a; 207a, 208a, 230a, 231a), only two were produced by the government, viz. the "master" statement made in 1953 and a statement dated February 28, 1955 (62a). There was no explanation offered for the failure to produce the others.

The Court refused to permit the defense to examine the so-called "master" statement because, in the judge's opinion (1), there was no "material inconsistency" between it and the testimony and (2) it contained some things unrelated to the case (369a).

The judge did permit defense counsel to have the second statement dated February 28, 1955 (369a, 370a) and

it was turned over to defense counsel for their inspection at 10:30 A. M. on October 24, 1956 (368a-370a), two days after the witness Mishel had left the stand (157a, 247a). At about two o'clock in the afternoon of the following day the Government suddenly rested its case (463a, 477a). The defense, of course, had no advance notice of the point at which the government was going to rest. Confronted with the situation thus presented, defense counsel promptly moved for alternative relief as to the February 28th statement of Mishel (498a). He asked that he either be permitted to offer it in evidence or that Mishel (who was in the building) be re-called for cross-examination with respect to it (498a). The Government opposed the application on the basis of the *Krulewich* and *Gordon* cases (499a). The trial judge denied the defense application in its entirety (502a). Thus, as a practical matter, although the defense had been furnished with one of the Mishel statements it was precluded from making any use of it.

Not to be able to obtain one, or use the other, of the prior statements of the government's chief witness Mishel, was, of course, most prejudicial to the defense.

Sershen, the Secret Service Agent, who had the interviews with the defendant as to the Chernoff bond transaction, was, of course, another important government witness (464a-477a). Indeed, it was this interview which precipitated the writing of the three letters upon which the indictment was based (43a). The sharp difference between Miller's and Sershen's version of the interview was crucial in the case as it was presented. Sershen testified that he made reports to the Treasury Department of the Chernoff bond transaction and the parts played in it by Miller and Mishel (68a), one of which was referred to as "an additional report from me (Sershen) concerning the negotiation of the bonds and the part that Mishel and Mr. Miller played" (69a).

Sershen's testimony, of course, related to exactly the matters as to which he said he made reports. However, only one such report was produced and it was marked defendant's Exhibit B for identification (68a, 69a). The record conclusively shows that defense counsel had asked for the production of all reports including those of the Secret Service Agent (246a, 247a). The failure of the government to produce this second Sershen report was as prejudicial as what occurred with respect to the Mishel statements.

In cross-examining the defendant, the government, over objection, was permitted to ask a series of collateral questions implying moral turpitude upon the part of the defendant and was not restricted to acts of misconduct for which convictions had been had (669a). For example, over defense counsel's objection and exception (669a, 670a) the defendant was asked whether, when he was Vice-President of the bank, the then President had not criticized him (Miller) for "allowing bookmakers to draw against uncollected funds" (669a, 670a); and for allowing the kiting of checks (671a). He was also asked whether the State Banking Department had not, in 1931, criticized him for allowing a bookmaker to "make book in a public telephone in the lobby" of the bank (671a). In other lines of cross-examination, Miller was asked whether he had not been subjected to a "full-scale" investigation by the Banking Department (672a); whether he had not been criticized for making loans to bookmakers (668a). Despite the defendant's negative answers to all these questions, the distinct impression was left in the minds of the jury, by the mere asking of the questions, that the defendant was of bad moral character who engaged in all forms of illegal banking practices and was tied-in with a group of shady and unsavory criminal characters.

Basis for Federal Jurisdiction in the District Court

The basis for Federal Jurisdiction in the District Court is believed to be United States Code, Title 18, Section 1001, Section 3231.

Argument Amplifying the Reasons Relied on for the Writ

The court below has decided important questions of federal law in a way probably in conflict with the applicable decisions of this court.

QUESTION ONE

Under the rule of the recently decided *Jencks* case (*Jencks* v. *United States*, 353 U. S. 657) was it reversible error for the courts below to (1) deny the defendant the right to examine a prior inconsistent statement of the government's principal witness Mishel and (2) to foreclose defense counsel from making any use of another (and concededly contradictory) statement of the same witness which was not made available to the defendant until after the witness left the stand and (3) to also refuse to make available to defense counsel one of two prior reports made by another government witness (a Secret Service Agent) on the subject matter of his testimony?

We have heretofore documented the portions of the record which pose the foregoing questions (ante, pp. 21-24).

The instant case was argued in the Court of Appeals on May 17, 1957 (42a) and this court's decision in the

Jencks case was not rendered until June 3, 1957 (353 U. S. 657). At the trial, defense counsel in the instant case believed, as did defense counsel in the *Jencks* case (Cf. *Jencks* v. *United States*, 353 U. S. 657 at p. 670), that the Court of Appeals decisions in the *Krulewich* and kindred cases, restricted his motions with regard to statements to a request that the trial judge inspect the prior statements for his determination as to whether, and to what extent, the statements should be made available to the defendant (246a). Laboring under this erroneous, but excusable misunderstanding of the law, no issue was raised on the main appeal as to the denial to the defendant of such statements. However, after the Court of Appeals made its decision on July 10, 1957 affirming the judgment of conviction (42a) the petitioner filed a timely petition for rehearing based on this court's decision in the *Jencks* case (117a). The Court of Appeals, in an opinion (117a-121a; Appendix hereto, pp. App. 1-App. 5), denied the rehearing on three grounds.

The first ground of denial dealt with the Mishel statement of February 28, 1955 which the trial court had directed the government to deliver to the defense, but which had not actually been delivered until two days after Mishel had left the stand (118a, 119a, 157a, 247a; 368a-370a). In dealing with this situation, the Court of Appeals pointed out that the defense counsel had he statement in his possession for about twenty-four hours before moving to recall Mishel for further cross-examination or for permission to introduce the statement in evidence (118a). Further, the Court of Appeals pointed out that the defendant's application was not made until after the government rested (118a). In the view of the Court of Appeals, the defendant should have made his motion sooner and because he had not done so, there was no abuse of discretion in denying the defendant's alternative motion (119a). In reaching its conclusion, the Court of Appeals apparently overlooked several important things. During a great part of the

approximately twenty-four hours that elapsed between the delivery of the statement and the defendant's motions with respect thereto, defense counsel was actually engaged in the trial of the case. And any experienced trial lawyer knows that during the after court hours, counsel spends a good part of the night preparing for the following day in court. Then, too, counsel must sleep and eat. If the court time, and the time required for sleeping and eating, to say nothing of the night preparation time, is subtracted, the twenty-four hour period would be substantially reduced. The Court of Appeals apparently overlooked, too, the fact that defense counsel had no way of knowing when the government would rest. Actually, the government had not produced the statement for over 48 hours after Mishel had left the stand (157a, 247a; 368a-370a), so that the lack of timeliness was, in large measure, chargeable to it. In the last analysis, however, to deny the defendant so substantial a right on the basis of a fine hair-splitting question of timeliness of his application, under the circumstances of this case, seems most unjust. How many hours, or minutes sooner the application should have been made is not indicated by the court below.

The second ground of the Court of Appeals denial of a re-hearing dealt with the trial judge's denial of the right of inspection with regard to the "master" statement (119a, 120a). As to this, the Court assumed that it was error for the trial court to deny this inspection (119a). However, it pointed out that by a stipulation dated December 18, 1956 (78a) counsel had agreed that the "master" statement need not be made a part of the record and for this reason it said "Since we (the Court of Appeals) cannot know that the failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered" (120a). There are two complete answers to the reasoning of the Court of Appeals. In the first place, the stipulation not

to print the "master" statement was made on December 18, 1956 (78a), or more than six months prior to this court's decision of the *Jencks* case in June 1957. At the time of the stipulation, the *Krulewich* case was the controlling authority, and under it, the defendant did not have the absolute right to compel the production of such statements. In short, at the time the record on appeal was prepared, there was not any appealable issue that could be raised relating to the denial of an inspection of the statement. Surely a defendant should not be penalized because of the failure of his counsel to anticipate this court's decision in the *Jencks* case. But there is a more conclusive answer to the reasoning of the Court of Appeals. Under this court's decision in the *Jencks* case, the defendant has the absolute right to examine a prior statement of a witness once it is established that such statement exists and relates to the testimony of the witness. That was conclusively established in this case (230a, 231a). This court, in the *Jencks* case, pointed out that irrelevant matter could be excised. A proper foundation having been laid, the defendant had the absolute right, regardless of the content of the statement, to inspect it under this court's *Jencks* decision. There was absolutely no need for the Court of Appeals to see the statement—and it was, therefore, completely unimportant that it was not made a part of the record. Prejudice to the defendant must be presumed from its denial because a complete foundation for it in accordance with the *Jencks* case (353 U. S. 657, 669), had been laid (230a, 231a).

The third and final ground of the denial of a re-hearing dealt with the second or "additional" report of Secret Service Agent Sershen (120a, 121a). Here the ground of denial was the alleged failure to lay a proper foundation (121a). The court conceded that Sershen's testimony that he had made "an additional report . . . concerning the negotiation of the bonds and the parts played in it by Miller and Mishel" (69a) did, perhaps, "justify an infer-

ence that Sershen had made a prior report" (120a). In our view, there is no other permissible inference. The Court of Appeals speculated, however, that such prior report "may have been oral". There is no basis in the evidence for such speculation. Indeed, the more logical inference is that the "additional" report was written—as was the case of the one produced. Finally, the court said that if it were a written report "there is nothing to indicate that it related to interviews with Miller or Mishel" (120a). We are at a complete loss to understand how such a statement could be made. Sershen's testimony was that he made "an additional report . . . concerning the negotiation of the bonds and the parts played in it by Miller and Mishel". Sershen's entire testimony related to exactly the same subject, i. e. the sale of the bonds and the parts played in it by Miller and Mishel (464a-477a). Under the circumstances, therefore, a completely proper foundation had been laid, within the *Jencks* case, to require the production of the second, or "additional", Sershen report.

QUESTION TWO

Does the statute (18 U. S. C. §1001) upon which the indictment was based make it a crime for a person, in this case a bank president, to write a letter to a government agency which merely recites his (the writer's) interpretation of conclusions reached by government investigators who had interrogated the writer with respect to the procedures followed by the bank in cashing certain government bonds, or does the statute only make criminal a willfully false and fraudulent statement of a material fact, as distinguished from mere opinion?

If the statute under which the defendant was indicted (18 U. S. C. §1001) is to be construed as contended for here by the Government, the results will, indeed, be far-reaching. The age-old conception of the crime of perjury will be gone (18 U. S. C. §1621). Any person who failed to tell the truth to the myriad of government investigators and representatives who now circulate throughout the land about any matter, regardless of how trivial, whether civil or criminal, or whether merely the expression of an opinion as to a conclusion reached by a government agent, will render the person subject to indictment and conviction of serious Federal crime. And any such mis-statement will be penal in character even though the government was neither misled, deceived or defrauded thereby.

We have been unable to find any reported case where the mere writing of letters, such as those here involved, was held to constitute a crime within this statute. The genesis of the letter writing was the civil claim of the government for reimbursement in the amount of $6,684.50 for bonds erroneously cashed (Exhibit 28a; 32a, 33a).

In the second letter, which formed the basis of the second count (Exhibit 23; 29a, 30a), the defendant advised the Government that its claim would be paid as soon as it was processed (30a). The claim was, in fact, paid in full (645a).

Whether the letters be read singly, or collectively, the most that can be said against them is that the defendant as the President of the Bank, and the bank's attorneys, were trying to explain their reasons for "feeling" that the bank should not be required to pay the loss. The indictment alleges that the defendant in writing the first two letters made "a false and fraudulent statement as to a material fact" in expressing his conclusion that the Chernoff bonds were cashed in compliance with government regulations (1a). Whether or not the regulations were complied with was, at most, a question of Miller's opinion. But what about the word "fraudulent" which appears in both the statute and the indictment. Certainly, its use expresses or implies the thought that some government agency was defrauded by reason of the two letters. What fraud was committed, or how the letters accomplished it, remains completely unexplained in this record.

The third count of the indictment, based upon a letter written by the bank's attorney, alleges that the fraudulent statement of material fact was the representation that Mishel introduced a person to Miller as Chernoff. Again, we have the question of what fraud was accomplished and how the letter played a part, directly or indirectly, toward that end. The letter itself (Exhibit 24: 40a, 41a) suggested a re-investigation of the transaction and gave assurance of full cooperation therein (41a). A fair interpretation of the letter is that it was merely an attorney's letter written for the purpose of explaining why his client felt that it should not be required to pay a claim. In no sense was it designed to nor did it accomplish any fraud. And, at all events, the mere fact that Miller saw the let-

ter before it was sent, is not enough to make him the author of it as the third count of the indictment charged (2a). Since the writing of the letters here involved does not constitute a crime within the meaning of the statute under which the indictment was found, the defendant's motions for judgment of acquittal, made at the close of the Government's case (479a-484a), and renewed at the end of the entire case (802a, 803a), should have been granted and the indictment dismissed.

QUESTION THREE

Was it reversible error for the trial court to permit (and the Court of Appeals to approve) an extensive and highly prejudicial cross-examination of the defendant as to various (but unproved) collateral matters implying moral turpitude, the mere inquiries as to which, despite defendant's denials, suggested to the jury that the defendant was a man of bad moral character and unworthy of belief, or should the cross-examination have been restricted, in accordance with the prevailing rule in all the Federal circuits, to those collateral matters which involve a conviction for felony, or for such misdemeanors as embraced moral turpitude?

We will not repeat the references to and documentation of the portions of the record dealing with the improper cross-examination because it is all contained in the last paragraph of our "Statement of the Case" (See, ante, p. 24).

The Court of Appeals disposed of the contention that the improper cross-examination constituted reversible error in a single (and the concluding) paragraph of its opinion for affirmance (49a). It reached the conclusion

that no reversible error was committed because—so it reasoned—the defendant by taking the stand had placed his character in issue. Further, the court pointed out, he had on his direct examination testified, in detail, as to his unblemished banking career. But then it added this most significant and shocking statement (49a):

> "The cross-examination sought to demolish the claims he had voluntarily asserted".

We thoroughly agree with the court below, that the purpose of the cross-examination was to "demolish" the character of the defendant. We go further, and assert that a thorough demolition job was accomplished in the eyes of the jury. The desired objective was accomplished by the unfair and prejudicial trial tactic of asking on cross-examination, a whole series of collateral questions suggesting divers forms of immorality and misconduct, which questions, despite the defendant's negative answers, created the false and untrue impression that the defendant was a man of bad character and wholly unworthy of belief.

A reading of the line of questions which were asked this defendant on cross-examination (See ante, p. 24), such as, whether his superior had not criticized him for allowing "bookmakers" to draw on uncollected funds; whether he had not allowed the "kiting" of checks: whether he had not been reprimanded by the State Banking Department for permitting a bookmaker to carry on his business from a telephone booth in the lobby of the bank; whether he had not been subjected to a "full scale" investigation by the State Banking Department; whether he had not been criticized for making loans to bookmakers—all the foregoing questions (ante, p. 24) and others of like character, could not, despite the defendant's vehement denials, do other than create the totally false picture in the minds of the jury that the defendant was the consort of criminal characters and a shady banker who engaged in loose and illegal banking practices. There was not a

scintilla of evidence in the case of any of the acts of misconduct which were insinuated by the foregoing questions. But the harm was done by the mere asking of the questions.

No idea was entertained by the cross-examiner that proof would be elicited by the matters implied in his questions. We say "implied" because the asking of the direct questions, in the manner in which they were asked, implied to some degree that the examiner, who represented the United States Government, was possessed of information upon which the questions were based, and although the answers were in the negative, the bad effect of the insinuations thrown out by the questions, could not have failed to leave a deep and lasting adverse impression in the minds of the jury.

Here the conclusion is irresistible that the whole series of questions were asked for the sole purpose of planting in the minds of the jury suspicion and distrust by insinuations that the defendant had falsely denied his guilt as to the collateral matters embraced in the question. The questions were so framed that it is quite apparent that they were calculated, by suggestion of misconduct, to prejudice the jury, regardless of the answers given. By the line of questions which the prosecutor pursued on cross-examination here the jury could not have failed to gain the general impression, and strong conviction, that the defendant was a bad sort who should be convicted for other acts, if not for the crime charged (Cf. *United States* v. *Grayson*, 166 Fed. 2nd 863, 870, 871).

An accused defendant in the witness box, though completely innocent, when subjected to such a line of cross-examination as to collateral matters as was allowed here, is in a helpless and hopeless position. All that he can do is give a big resounding negative answer to every question. But despite his denials, the harmful effect of the questions

makes its bad impression on the jury. The prosecutor, however, is in an invulnerable position. He can, without the slightest danger to his case, ask any insinuating misconduct question which his imagination can conjure up. If the defendant admits the misconduct, the prosecutor has definitely scored. But even if it is denied, the prosecutor still scores heavily because the jury gets the distinct impression that the denial of the misconduct is false because the prosecutor, who represents the government, would never have asked the question unless he had some basis for it. The prosecutor scores either way, therefore, and runs no risks in asking the question. His is a completely safe position, while that of the accused is a hopelessly defenseless one. Such a system for the trial of criminal cases is repugnant to our basic and elementary sense of justice, decency and fair play. Wigmore regards such a system (which does not prevail in the Federal courts, as we shall hereafter demonstrate) as so offensive that, in an interesting analogy, he likened it to the difference between the hunt and the slaughterhouse. Wigmore's comment on such a system is as follows:

> "It is the difference between the hunt and the slaughter-house. One may well enough find sport in stalking the lion in the desert or beating the bush for the tiger, because there is risk for the hunter which dignifies his sport, and there is a rapacity and a destructiveness in the hunted which leaves no room for sympathy; but the process of cutting the throat or knocking the head of a sheep or an ox penned in the shambles is both safe and brutal, and is to be justified only on the ground of its absolute necessity" (Wigmore on Evidence, Third Edition, § 983, p. 551).

We agree that the ruthless flaying of personal character in the witness box is, among other things, cowardly, because there is no escape for the victim. More than that, however, it is brutal—because it unfairly inflicts the pain of groundless implications of misdeeds which the defend-

ant is helpless to combat. Its most vicious aspect, however, is that it leads to guilty verdicts against innocent people. The risks of jury trials in criminal cases are notorious—as is the frequency with which prejudice injects its ugly head into them. An overzealous prosecutor should, therefore, be precluded from arousing jurors' prejudices against a defendant by unfair trial tactics. This philosophy was well expressed in the dissenting opinion of the late Judge Frank of the Second Circuit in the case of *United States* v. *Antonelli Fireworks Co.*, 155 Fed. 2nd 631 (2nd Cir. 1946), wherein he said (at pp. 658, 659):

> "A jury trial, at best, is chancey. 'Mr. Prejudice' and 'Miss Sympathy' are the names of witnesses whose testimony is not recorded, but must nevertheless be reckoned with . . . and most jurors have no trained capacity for doing so. If government counsel in a criminal suit is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent. He should not be permitted to summon that thirteenth juror, prejudice."

Fortunately, and with singular unanimity, with the single exception of the Court of Appeals decision in this case, all the Federal courts, including the Second Circuit, are in accord that in a criminal case, a defendant may only be cross-examined as to those collateral acts of misconduct as have resulted in convictions for felony or for misdemeanors involving moral turpitude. This reasonable rule has a sound and logical basis because it prevents such unfair tactics as were resorted to in the instant case, but at the same time it allows the prosecutor a fair latitude of examination as to collateral matters. The rule of limitation is more strict in the case of a defendant in a criminal case than it is with respect to an ordinary wit-

ness. The reasons for this stricter rule as to a defendant in a criminal case was well stated in *United States* v. *Schiller*, 187 Fed. 2nd 572 (2nd Cir. 1951) where the court said (p. 576):

> "Cross-examination as to his past acts of misconduct may prejudice the defendant *qua* accused in the eyes of the jury to an extent which far outweighs any value it may have as evidence on the issue of his credibility as a witness. For that reason, Wigmore suggests that such impeachment should be limited more strictly in favor of the accused than in the case of the ordinary witness". See Wigmore, §983(4), 987. Cf. 8 Wigmore §2277(4); *Gidion* v. *U. S.*, 52 F. 2d 427, 429-430; *Ellis* v. *District of Columbia*, 45 App. D. C. 384, 388.

Peculiarly enough, it was an opinion of the Second Circuit Court of Appeals, in the case of *Provo* v. *United States*, 215 Fed. 2nd 531 (2nd Cir. 1954) that first recognized the impressive unanimity of Federal Court decisions restricting the right of cross-examination of a defendant in a criminal case to those collateral matters which had resulted in conviction for felony or for misdemeanors involving moral turpitude. In that case, an army staff sergeant was convicted of treason. On his cross-examination the defendant had been cross-examined with respect to whether or not he had not been confined to an army hospital because of his homosexual aberrations. The Court of Appeals held that such cross-examination was reversible error and in so doing said (p. 536):

> "In the Federal courts there has been an impressive unanimity of view on the point before us. As generally held, specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes."

We are at a loss to understand why the Court of Appeals in the instant case, decided three years later, failed to follow its own rule, as laid down in the *Provo* case. Nor can we account for its departure from the rule of all the other Federal Courts in view of its recognition, in the *Provo* case, that there was an "impressive unanimity" on the point.

However, in acknowledging the "unanimity" with which the Federal courts adhered to the rule limiting cross-examination of a defendant in a criminal case, the Second Circuit Court of Appeals, at least in the *Provo* case (although not in the instant one), was clearly right. We will merely cite some of these cases from other circuits:

Escheat v. *United States,* 188 Fed. 2nd 336, 343 (8th Cir. 1951) which cites three other 8th Circuit cases to the same effect;

Henderson v. *United States,* 202 Fed. 2nd 400, 406 (6th Cir. 1953);

Pearson v. *United States,* 192 Fed. 2nd 681 (6th Cir. 1951);

Westwater v. *Lyons,* 193 F. 817 (3rd Cir. 1912);

Ross v. *United States,* 93 Fed. 2nd 950 (7th Cir. 1937);

Simon v. *United States,* 123 Fed. 2nd 80 (4th Cir. 1941), cert. denied, 314 U. S. 694;

Glover v. *United States,* 147 Fed. 426 (8th Cir. 1906);

Pittman v. *United States,* 42 Fed. 2nd 793 (8th Cir. 1930);

Lennon v. *United States,* 20 Fed. 2nd 490, 494 (8th Cir. 1927);

United States v. *Klass,* 166 Fed. 2nd 373, 376 (3rd Cir. 1947);

Scaffidi v. *United States,* 37 Fed. 2nd 203, 211 (1st Cir. 1930);

Campion v. *Brooks Transp. Co.,* 135 Fed. 2nd 652, 653 (U. S. C. A. Dist. of C., Vinson, J.) 4th Cir. 1943;

Ingram v. *United States*, 106 Fed. 2nd 683, 684 (9th Cir. 1939).

Thus, the foregoing decisions from the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th and 9th Circuits, demonstrate that the rule is uniformly applied in eight out of the eleven Circuits in the United States. There is no evidence of any different rule in the other three Circuits. The instant case represents the only contrary decision on the point and it is, therefore, *sui generis*.

In the face of the foregoing impressive authorities, we confidently assert that the decision of the Court of Appeals on the point, as rendered in the instant case, is completely out of line with the prevailing Federal rule. If principles can ever be settled by authority, if the slightest respect is due to the opinions of other tribunals, it would seem that the court below should not have rejected the overwhelming weight of authority reflected by the cited decisions.

For the sake of maintaining a uniform Federal rule, in which principle, citizens generally, and not merely the petitioner, are vitally interested, certiorari should be granted herein.

Conclusion

Wherefore, it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit should be granted.

N. LEVAN HAVER,
Attorney for Petitioner,
41 Pearl Street,
Kingston, N. Y.

Dated, October 25, 1957

Opinion of the Court of Appeals Denying the Petition for a Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 307—October Term, 1956.

(Petition filed July 24, 1957 Decided October 1, 1957.)

Docket No. 24457

UNITED STATES OF AMERICA,

Appellee,

—v—

JAMES W. MILLER,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and
SWAN and POPE, *Circuit Judges*.

Petition for Rehearing

N. LE VAN HAVER, *Attorney for Appellant*.

PAUL W. WILLIAMS, United States Attorney, for Appellee; Adelbert C. Matthews, Jr., Assistant U. S. Attorney, of Counsel.

PER CURIAM

After our decision of affirmance on July 10, 1957, the appellant filed a timely petition for rehearing raising new

Opinion of the Court of Appeals Denying the Petition for a Rehearing

issues based on *Jencks* v. *United States*, 353 U. S. ——, a decision rendered subsequent to the argument of Miller's appeal. The Government having been allowed to answer the petition and the petitioner to file a reply, which he did on September 10th, the matter is ready for determination.

The petitioner contends that he is entitled to a new trial because the trial procedure was not in accord with the rule subsequently announced in the *Jencks* case. An important witness for the prosecution was Irving Mishel. At defense counsel's request two statements made by Mishel and in the possession of the Government were examined by Judge Walsh pursuant to the rule of *United States* v. *Krulewitch*, 2 Cir., 145 F. 2d 76 to determine whether counsel was entitled to use them in cross-examination. One of the statements, dated February 28, 1955, was turned over to counsel, but use of the other statement, made in 1953, was denied, because Judge Walsh found that it contained nothing materially inconsistent with Mishel's testimony and did contain matter "unrelated to this case." The statement was marked "Court's Exhibit 3", placed in a sealed envelope and filed with the Clerk of the Court. By stipulation between appellant and appellee dated December 18, 1956 this exhibit was excluded from the record on appeal.

1. The petition for rehearing complains that the 1955 statement was not made available to the defense until after the cross-examination of Mishel had been concluded and the prosecution had closed its case. The record does not bear this out. Counsel got the statement on the morning of October 24th. This was after Mishel had left the stand but long before the Government rested on the afternoon of October 25th. When the Government rested, defense counsel moved for judgment of acquittal and during the

argument asked for leave to put Mishel's 1955 statement in evidence or to recall him for cross-examination about it. This request was denied. The petitioner claims that such denial is contrary to the law established by the *Jencks* case. The Government contends that the only issue presented is whether Judge Walsh's refusal to recall Mishel was an abuse of discretion and that the *Jencks* case has nothing to do with this issue. We think the Government is right. The statement, which does not appear in the record on appeal, is a short one, according to the government's answer to the petition for rehearing, consisting of only four handwritten pages. Defense counsel received it on the morning of October 24th and the government did not rest until the afternoon of October 25th. During this interval there would appear to have been ample time for counsel to examine the statement and make his motion to recall Mishel for further cross-examination before the government rested. We see no abuse of discretion in denying the motion. It was made too late.

2. With respect to the 1953 statement the petitioner complains that under the *Jencks* decision he was entitled to have the statement delivered to defense counsel, despite Judge Walsh's determination that it contained nothing materially inconsistent with Mishel's testimony. This is true. But if the case is remanded for a new trial, the procedure will be governed by the recent amendment to Chapter 223 of Title 18 of the United States Code. Concededly the statement contains some matter not related to the subject matter of Mishel's testimony. Hence, subdivision (c) of the new statute will apply, and it will be the duty of the trial judge to "excise the portions of such statement which do not relate to the subject matter of the testimony of the witness," and "With such material excised,

the court shall then direct delivery of the statement to the defendant for his use." We shall assume that Judge Walsh's failure to follow such procedure was an error but we cannot determine whether or not it was a prejudicial error because the exhibit has by stipulation been excluded from the record on appeal. Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered.

3. Two Special Agents of the United States testified as witnesses for the prosecution. Agent Sweeney testified to the existence of a report prepared by Agent Sershen in October 1950. Pursuant to request, this report, marked "Defendant's Exhibit B" for identification, was given to defense counsel. The following morning counsel informed the court that he had no further questions to ask Agent Sweeney. During cross-examination of Agent Sershen, he testified that in October 1950 his office received a letter from the Treasury Department and that "* * * that there was a request made in that letter for an additional report from me concerning the negotiation of the bonds and the part that Mishel and Mr. Miller played. And I submitted a report in answer to that letter." This report of October 1950 was apparently assumed by defense counsel to be the report already delivered to him as Defendant's Exhibit B for identification, since at no time during Agent Sershen's direct or cross-examination did counsel ask for the production of any statements or reports, nor question him about Exhibit B. However, it is now contended that the word "additional" in Sershen's above-quoted testimony indicates that he made a prior report which should also have been delivered to defense counsel under the *Jencks* case ruling. We think the contention unsound. While

the word "additional" may justify an inference that Sershen had made a prior report, such prior report may have been oral, and, if it be assumed to have been a written report, there is nothing to indicate that it related to interviews with Miller or Mishel. Sershen was never questioned about a prior report. Under the *Jencks* case the defense must lay a preliminary foundation that a statement or report is in existence and relates to the subject matter of the testimony of the witness. We do not think such preliminary foundation was laid with respect to a prior report by Sershen.

4. The petition for rehearing is denied but petitioner's alternative request for a stay pending application for certiorari is granted pursuant to Rule 28(c)(2) of this Court.

Opinion of the Court of Appeals Affirming the Judgment of the District Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 307—October Term, 1956.

(Argued May 17, 1957 Decided July 10, 1957.)

Docket No. 24457

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES W. MILLER,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*,
SWAN and POPE, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

From conviction and sentence on an indictment which charged the making of false and fraudulent statements in violation of 18 U. S. C. A. §1001, the defendant has appealed. Affirmed.

GAREY & GAREY and N. LEVAN HAVER, *Attorneys for Appellant;* Jacob J. Rosenblum, Sol Irving Sokolsky and Peter F. Rooney, of Counsel on main brief, and Charles H. Gaffney, of Counsel on supplemental brief.

Opinion of the Court of Appeals Affirming the Judgment of the District Court

PAUL W. WILLIAMS, United States Attorney, *for Appellee*; Adelbert C. Matthews, Jr., George C. Mantzoros and Maurice N. Nessen, Assistant United States Attorneys, of Counsel.

SWAN, *Circuit Judge:*

This appeal is from a judgment of conviction and sentence, after trial to a jury, for making false and fraudulent statements in a matter within the jurisdiction of the Fiscal Service of the United States Treasury Department.[1] The indictment comprised three counts, each based on a separate letter addressed to the Fiscal Service and concerned with the cashing of certain United States Savings Bonds at a bank of which the defendant was president. The bonds were registered in the names of members of the Nat Chernoff family from whom they had been stolen. The Treasury Department claimed that the bank was liable for erroneous payment of the bonds, and the three letters were written for the purpose of convincing the Fiscal Service that the bonds had been properly cashed in accordance with the requirements of the Treasury's circular letter. Irving Mishel, a depositor of the bank, had presented the bonds for redemption. He was a convicted felon who ran an illegal check-cashing agency and was in the business of

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[1] The offense is defined in 18 U. S. C. A. §1001 which reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any faults, fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

disposing of stolen bonds. He testified as a witness for the prosecution. His testimony, if believed, would justify the jury not only in discrediting Miller's testimony that he was an innocent dupe of Mishel but in finding that he knew that Mishel had no right to cash the bonds and received 10 per cent of their proceeds for assisting him to do so. All the points urged on appeal are technical and lack substantial merit.

The first to be considered relates to venue. The letters containing the allegedly false and fraudulent statements were mailed in New York City. Two of them were received by the addressee in Washington, D. C., the other in Chicago, Illinois. The appellant contends that the crime defined in section 1001 of Title 18 is committed only when the false statement is communicated to the federal agency having jurisdiction of the matter involved; consequently venue was improperly laid in the Southern District of New York. This argument takes no account of another statute, 18 U. S. C. A. §3237, dealing with offenses commenced in one district and completed in another.[2] The precise point with respect to the crime of which the appellant has been convicted was determined in *De Rosier* v. *United States*, 5 Cir., 218 F. 2d 420, cert. denied 349 U. S. 921. We agree with it. Moreover, even if the venue point had merit, we should have to hold that it was waived, since the defendant, with

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2 "§3237. Offenses begun in one district and completed in another

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matters moves."

full knowledge that the counts in the indictment were based on the letters did not question venue until after the prosecution had rested its case.

Prior to trial the defendant moved for dismissal of the first and second counts of the indictment on the ground that they do not inform him of the nature of the accusation nor provide "a plain, concise and definite written statement of the essential facts constituting the offense charged," as required by Rule 7(c), Federal Rules of Criminal Procedure. The motion to dismiss was denied. On appeal he asserts that all three of the counts are defective in using the words "to the effect that" in charging the falsity of the statement involved in each count. As to count I the failure to raise the alleged defect by pre-trial motion constituted a waiver.[3] Since the appellant was given a five year sentence on each count, all to run concurrently, he would gain nothing, even if counts I and II were held to be "defectively" stated. But plainly they were not. Count I is set forth in full in the margin.[4] Count II, based on the letter of April 4,

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[3] See Rule 12(b)(2), F. R. Cr. P.; *Dunbar* v. *United States*, 156 U. S. 185, at 191-2.

[4] "On or about December 26, 1951 at the Southern District of New York, James W. Miller, the defendant herein, in a matter within the jurisdiction of a department of the United States, namely, the Fiscal Service of the United States Treasury Department, did unlawfully, wilfully and knowingly make a false and fraudulent statement as to a material fact to the effect that a quantity of bonds in the names of members of the Nat Chernoff family were properly cashed in accordance with procedures laid down by circular letter of the United States Treasury Department, whereas in truth and in fact as the defendant then and there well knew, the said bonds were not properly cashed in accordance with procedures laid down by the said circular letter. (Title 18, Section 1001, United States Code)."

1952, makes substantially the same charge.[5] Each of the counts is a good illustration of the simplified pleading required by Rule 7(c) of the Federal Rules of Criminal Procedure. It is sufficient to enable the defendant to understand the nature of the accusation, to give him the needed information to prepare his defense, and to make it possible for him to plead the judgment in bar of another prosecution for the same offense should occasion for doing so arise. That is all that is required of an indictment, as this court has often held.[6]

Interrelated with the claimed insufficiency of the indictment are claims of fatal variance between allegations and proof under Counts I and II, and of errors in the court's charge with respect to these counts. Each count charged that the defendant made a false statement to the effect that the bonds were properly cashed.[7] The proof adduced to establish the charges were letters written by the defendant dated respectively December 26, 1951 and April 4, 1952. The pertinent part of the December letter stated:

> "At the time the investigation was made by your Department *we were informed* [italics added] that the bonds were properly cashed in accordance with procedure laid down in your official circular and consequently no claim would be made against us."

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[5] Count III, based on the letter of June 4, 1952 charges the making of a false and fraudulent statement "to the effect that one Irving Mishel introduced a person to the defendant, James W. Miller, as Mr. Chernoff, whereas in truth and in fact as the defendant then and there well knew, he did not introduce any person to the defendant as Mr. Chernoff."

[6] See *United States* v. *Josephson*, 2 Cir., 165 F. 2d 82, 85, cert. denied 333 U. S. 838, and cases there cited.

[7] See note 4, *supra*.

Opinion of the Court of Appeals Affirming the Judgment of the District Court

The April letter said:

> "We regret that you are insisting on reimbursement because *we feel* [italics added] that these bonds were cashed in good faith and within the meaning, letter and spirit of Paragraph 4 of the Treasury Department in a circular covering such redemptions dated December 19, 1947."

Because of the italicized words in the letters above quoted the appellant contends that the proof failed to establish the accusation charged in counts I and II, respectively. The contention of a fatal variance is preposterous. The indictment did not purport to state the exact words of the false statement but it plainly stated the substance of the accusation. The defendant claimed no surprise when the letters were offered and made no objection to their admission. The governing rule is stated in *Berger* v. *United States*, 295 U. S. 78, 82. Within the meaning of that rule the accused was definitely informed as to the charges against him; he was not taken by surprise and he is protected against another prosecution for the same offense.

Apparently no exception was taken to the portion of the court's charge as to counts I and II, which the appellant now claims was erroneous and must have confused the jury. Nevertheless, we have carefully examined the charge and think it correctly advised the jury as to what they must find to convict the defendant under counts I and II.

With respect to count III the appellant asserts error in the charge and in permitting the Government to use hearsay evidence. Under this count the issue was whether or not Mishel introduced anyone to Miller as Chernoff.[8] The portion of the court's charge to which objection was made

[8] See note 5, *supra*.

is set forth in the margin.[9] The tellers testified that when they cashed the bonds they saw Miller at his desk and no one was with him except Mishel. On cross-examination each teller admitted that he did not know whether Mishel came into the bank alone or with someone else who might have been introduced to Miller and left before they saw Mishel and Miller at the latter's desk. The appellant complains that the quoted charge leaves the impression that the tellers corroborated Mishel. We do not so read it. The words "at that time" refer to the time when the bonds were cashed, not to the time of the claimed introduction. The trial judge was merely summarizing some of the evidence and he repeatedly cautioned the jury that their recollection of the facts, not his, was controlling. We see no error in the charge.

On the several occasions when the bonds were cashed, they were taken by a bank guard named Kennedy, who died before the trial, from Miller to a teller who cashed them and gave Kennedy the money to take back to Miller. The three tellers were permitted, over the defendant's objection, to testify as to conversations with Kennedy regarding messages to them from Miller. This testimony was properly admitted as being within an exception to the hearsay rule, namely, that statements made by an agent within the scope of his authority are admissible

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9 "Now, that gets us to one of the heart questions, whether in fact Mishel introduced a person to the defendant at the time the bonds were cashed as Chernoff or whether he did not. The defendant claims that he did, and he has testified that he did. The prosecution claims that he did not, and in that course they have submitted Mishel as a witness and they have produced the tellers who claim to have seen who was at Mr. Miller's desk at that time. You have heard their testimony in that regard."

against his principal.[10] Kennedy was Miller's agent to deliver the bonds and return with the money. While it is true that the agency cannot be proved by the hearsay statements of the alleged agent himself, there was ample competent evidence to establish the agency-principal relationship between Kennedy and Miller.

Complaint is made that the cross-examination of the Government's witness Mishel was unduly limited. We see no basis for such complaint. On the contrary the record shows that the defendant was permitted extraordinary latitude in his cross-examination. Attempts to bring out that Mishel had duped officers of other banks had no probative value on the issues in this case and were properly checked. The court also properly prohibited independent proof, other than the defendant's own denial, to contradict Mishel's testimony on cross-examination as to collateral matters; for example, his statement about a safety deposit box of which he had joint control with Miller.[11] In the matter of cross-examination the trial judge has wide discretion and we see nothing to indicate that his discretion was abused.

Finally it is urged that improper cross-examination of the defendant constituted reversible error. On his direct examination the defendant related in detail the story of his life from boyhood on, telling of his hard work, his rapid promotion in the banking business, his unblemished career and his numerous civic honors and public services.

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[10] *United States* v. *S. B. Penick & Co.*, 2 Cir., 136 F. 2d 413, 416; *United States* v. *Perillo*, 2 Cir., 164 F. 2d 645, 647; *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 9 Cir., 210 F. 2d 732, 751, cert. denied 348 U. S. 817; 4 Wigmore, Evidence 3rd Ed., §1078.

[11] See *Smith* v. *United States*, 9 Cir., 10 F. 2d 787, 788.

Opinion of the Court of Appeals Affirming the Judgment of the District Court

Thus he placed in issue his character.[12] The cross-examination sought to demolish the claims he had voluntarily asserted. The allegedly improper questions related to the subject matter of his own direct examination. To only one of the whole series of questions did he make objection. We think no reversible error was committed.

Judgment affirmed.

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[12] *United States* v. *Silver*, 2 Cir., 235 F. 2d 375, 378, cert. denied 352 U. S. 880; *United States* v. *Pagano*, 2 Cir., 224 F. 2d 682, 686, cert. denied 350 U. S. 884.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of July one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge

HON. THOMAS W. SWAN
HON. WALTER L. POPE
Circuit Judges.

UNITED STATES
Plaintiff-Appellee

v.

JAMES W. MILLER
Defendant-Appellant

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk